No. 87-771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLARK-COWLITZ JOINT OPERATING AGENCY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONER'S REPLY BRIEF

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The D.C. Circuit 4-3 en banc has demolished the purpose of declaratory orders under 5 U.S.C. § 554(e), "to terminate a controversy or remove uncertainty," by its holding that such adjudications are not final as to participating parties—even when a party litigates and loses a statutory construction claim before an administrative agency, he may nevertheless litigate his claim again, or have an agency do it for him *sua sponte*.

The Solicitor General's brief on behalf of the Federal Energy Regulatory Commission confirms the destruction of preclusion principles by the majority en banc. To support such a result it must construct an alternate (although also fatally-flawed) approach—that the *Bountiful* decision "resembled a rulemaking." The fact is however, that the en banc decision, and therefore its role as a precedent, was not based on this newly-asserted approach and indeed recognized that the original decision was a declaratory order issued under 5 U.S.C. 554(e). Therefore, the damage inflicted to basic preclusion principles can only be cured by this Court.

ARGUMENT

1. With respect to preclusion the Solicitor General's brief is (a) mistaken in stating the question, and (b) mistaken in stating the applicable law.

(a) The question presented is whether the Commission may decide a legal claim one way, then later, in a proceeding between the same parties, decide the same claim the opposite way. Since PP&L litigated against Clark-Cowlitz Joint Operating Agency

(CCJOA) and lost its statutory construction claim in *Bountiful*, it should have been precluded from relitigating this claim against CCJOA, or having the benefit of FERC doing so *sua sponte*, in the subsequent *Merwin* proceeding.[1] FERC's stated concern now for maintaining "flexibility in carrying out its statutory mandate" (S.G. Br. 15) is no justification for reversing the *Bountiful* result *as to CCJOA and PP&L*. *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 173 (1984).

The Solicitor General contends that, for preclusion purposes, whether there is a Section 7(a) statutory preference is a different issue than whether there is *not* a Section 7(a) statutory preference. But the decision by FERC that one interpretation of a statute is required does indeed foreclose the conclusion that an opposite interpretation of the statute is also required, *as between the parties*.

(b) The applicable law on preclusion is entirely clear, and it is contrary to what the Solicitor General's brief

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[1] FERC is aware of the correct treatment of the question:

> According to the Commission's definition of res judicata, adopted in 1979 from the Third Circuit Court of Appeals, a judgment on the merits is conclusive in a subsequent proceeding when that proceeding is on the same cause of action and is between the same parties as in the prior proceeding. Further, res judicata applies to both issues that were raised and issues that could have been raised in the prior proceeding.

Greensboro Lumber Co. v. Rayle Electric Membership Corp., 40 F.E.R.C. (CCH) ¶ 61,283 at p. 61,918 n.1 (1987); *see also, McCulloch Interstate Gas Corp. v. FPC*, 536 F.2d 910, 913 (10th Cir. 1976); *Nantahala Power and Light Co.*, 29 F.E.R.C. (CCH) ¶ 61,179 at pp. 61,373-74 (1984).

says. When an agency decides a question in an adjudication between two parties, the decision is res judicata. The Court so held with respect to a question of fact in *United States v. Utah Constr. Company*, 384 U.S. 394 (1966).[2] Res judicata applies equally to questions of law, as the Court made clear in *United States v. Mendoza*, 464 U.S. 154 (1984).

The Supreme Court in recent cases, including the *Mendoza* case, is closely following the Restatement (Second) of Judgments (1982). Especially helpful in the present case (and contrary to the briefs of the Solicitor General and PP&L) is § 83 of the Restatement, which provides (subject to exceptions that do not apply here) that "a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."[3] And the Restatement (Second) of

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[2] FERC previously relied on *Utah Construction* in the *Nantahala* case (supra n.1);

> The heart of NP&L's argument is its assertion that a determination made in one proceeding does not prevent a losing party from attempting to persuade the Commission to change its mind on the same issue in a subsequent proceeding. We note, in this regard, that the doctrines of res judicata and collateral estoppel are applicable to administrative proceedings. *United States v. Utah Construction Company*, 384 U.S. 394, 442 (1966); *Second Taxing District of Norwalk v. FERC*, 683 F.2d 477, 484 (D.C. Cir. 1982).

[3] Not only should principles of res judicata require *Bountiful* to be accorded finality, but the statutory scheme governing judicial review and finality of FERC decisions provided under Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b), demands it as well. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334-41 (1958).

Judgments § 27 (1982) makes clear that res judicata applies to issues of fact or law.

2. The Solicitor General's brief discounts the fact that *Bountiful* was a declaratory order proceeding conducted pursuant to 5 U.S.C. 554(e), and argues that since the *Bountiful* adjudication "resembled a rulemaking," the application of preclusion principles "simply is not proper." (S.G. Br. 14). Not even the majority en banc so mischaracterized the *Bountiful* proceedings.[4]

When several new FERC Commissioners were inclined to reverse *Bountiful* at the time the private utilities were seeking certiorari of the Eleventh Circuit's decision upholding preference, the Solicitor General stated to this Court: "Under traditional res judicata principles, if this Court denies certiorari and the Court of Appeals judgment affirming the declaratory order becomes final these entities may be bound by the Commission's order in any future relicensing proceeding." J.A. 107 (cited in Petition at 10). This statement recognized the true nature of *Bountiful*. To now call it something else is an inappropriate expedient to avoid the correct result.

If an agency is free as a matter of hindsight to transform an adjudication into a rulemaking as the Solicitor General would have it, then the Congressional purpose in enacting 5 U.S.C. § 554(e) to promote finality through administrative declaratory order proceedings has been rendered a nullity.

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[4] But the majority en banc *did* incorrectly apply "retroactivity" principles. CCJOA's petition challenged that result (Pet. 17-18 n.7)—contrary to the Solicitor's assertion (S.G. 15).

Moreover, even if *Bountiful* were somehow properly viewed as a rulemaking proceeding, FERC would not be free to jettison the *Bountiful* "rule" in the *Merwin* adjudication, for "while an adjudication can overrule an earlier adjudication, the Administrative Procedure Act clearly provides that a rule can only be repealed by rulemaking. 5 U.S.C. §§ 551(5), 553 (1982)." *Am. Fed'n of Gov't. Employees v. Fed. Labor Relations Auth.*, 777 F.2d 751, 760 (D.C. Cir. 1985) (Scalia, J. concurring), citing *e.g.*, *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 445-46 (D.C. Cir. 1982), *aff'd mem.*, 463 U.S. 1216 (1983).

3. PP&L argues that the "economic impacts" of a license transfer were established as a comparative relicensing criterion by *Bountiful*. However, the issue of whether FERC can utilize the "economic impacts" of a license transfer as its sole basis to circumvent the municipal preference was clearly not decided by the unreviewable dicta in *Bountiful* (Pet. 23; J.A. 289), and no court or judge has ever decided otherwise.

In *Merwin* the FERC ALJ (249a-252a), and also the D.C. Circuit panel, held that while the Commission has broad authority to exercise technical judgment about the soundness and feasibility of competing applicants' plans to develop and utilize in the "public interest" the water resources of the region, that authority does not extend to the use of an "economic impacts" test to second-guess Congressional intent and "render the statutorily-mandated municipal preference a nullity."[5] 85a.

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[5] The cases cited by the Solicitor General (Br. 20) do not hold that FERC's broad authority extends to the use of "economic impacts" to circumvent the preference. They relate only to the

The majority en banc held, on the basis of its decision that the municipal preference provision is not applicable to the *Merwin* competition, that "FERC may include in its deliberations consideration of the economic consequences of the grant of a license" (33a), but remanded because FERC's result on the economics had been arbitrarily reached.

CCJOA therefore takes exception to the characterization (S.G. Br. 10) that because of the remand, "this case is in an interlocutory posture." There has plainly been a final reviewable decision (for the second time) on the preference question. Quite simply, if preference applies, it cannot be circumvented by FERC's economic analysis and a remand is obviated.

CONCLUSION

Summary action by this Court can undo the lower court's destruction of preclusion principles. The 4-3 en banc reversal of the Circuit's panel on this "bedrock issue of administrative law" (9a) plainly collides with this Court's holdings in *Utah Construction*, *Mendoza* and *Moitie*, among others, and must be reversed to assure correct application of preclusion principles in administrative practice.

Commission's authority to assess the economic *feasibility* of a project proposal and whether the project is economically preferable to the next-least costly alternative. See also 86a-87a.

Respectfully submitted,

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